SUPREME COURT OF THE UNITED STATES.

LINDSAY PHELPS & COMPANY,
Plaintiff in Error,

vs.

JOHN H. MULLEN AND THE STATE OF MINNESOTA,
Defendants in Error.

MOTION TO ADVANCE CAUSE ON THE CALENDAR.

To the Honorable the Justices of the Supreme Court of the United States:

Now comes the State of Minnesota, one of the defendants in error in the above entitled cause, by its Attorney General, and moves your Honorable Court that the said cause be so advanced upon the calendar of your Honorable Court as to have priority of date of hearing and argument over all civil causes appearing therein, in which neither the United States nor a state is a party thereto.

STATEMENT OF FACTS.

The above entitled cause involves the validity of a law of the State of Minnesota relating to the public inspection, surveying, scaling, marking of logs, lumber and timber, running out of any chartered boom located within any of the lumber districts into which the State of Minnesota has by law been subdivided.

The State of Minnesota comprises seven distinct lumber districts.

(Gen. Stat. of Minnesota, 1894, sec. 2391.)

One of the said districts, which is the one involved in the above entitled cause, embraces the following territory as defined in the terms of the statute:

"The Mississippi River and its tributaries below the outlet of Lake Pepin to the southern line of Wabasha county," and is known and distinguished as the Fourth District.

The Minnesota Boom Company referred to in the pleadings, is and ever since the 16th day of April, 1889, has been, a corporation organized, created and existing, and chartered under and by virtue of the laws of the State of Minnesota. The general nature of the business of said company is and always since its organization has been, the construction, maintenance and use of booms, dams and other structures of any kind necessary or advantageous to the performance of logging and lumbering business upon the Mississippi River or either branch thereof, also upon any side or bank, any slough, bayou, branch or part of said Mississippi River, also covering the gathering, driving, booming, storing, assorting, rafting, brailing and otherwise handling of logs, lumber or timber of any kind for itself and for any and all persons having logs, lumber or timber upon the waters of said river, between the mouth of the Chippewa river, or a point opposite thereto, and the point where the easterly boundary line of the city of Winona meets the Mississippi river, or a point opposite thereto, and also at divers and sundry other places.

Within the limits of the county of Wabasha in the State of Minnesota, and within said 4th district of said state, as the said state is laid off for the purposes of the surveying and measurement of logs, lumber and timber there, and branching out from said Mississippi river, is a large slough about three miles in length and of at least one quarter of a mile in width on an average at ordinary stages of water, commonly called and known as the West Newton Slough.

Said Minnesota Boom Company, under and by virtue of its said charter, duly issued and granted to it by the said state, and under and by virtue of the laws of said state, built and constructed several years ago, and ever since said time has maintained, continued, owned and operated a large number of booms within the limits of said slough for the purpose of collecting, gathering, storing, assorting, brailing, rafting and handling logs, timber and lumber as they should come down the Mississippi

river from points above in the ordinary course of business, being all the booms in said slough contained.

It is provided by a law of the said state that there shall be biennially appointed by the governor, with the advice and consent of the senate, a surveyor general for each of its lumber districts, who shall be a citizen of the district for which he is appointed at the time of his appointment, and who shall hold his office for two years and until his successor is appointed and qualified. (Gen. Stat. Minn., 1894, sec. 2392.)

Under and pursuant to the said law the defendant in error, John H. Mullen, was on the 7th day of April, 1893, duly appointed surveyor general of logs and lumber for the said 4th District of Minnesota, and he thereupon duly qualified and acted as such officer during all the times referred to in the pleadings in the said cause.

It is made the duty of the surveyor general by himself or deputy to survey all logs and timber running out of any chartered booms in his district and at the end of each month when he has surveyed any such logs or timber, to make out and deliver to the owner of such boom or the managing agent thereof, a true and correct scale bill stating the date of such survey, the number of logs, pieces of timber and marks thereon respectively, and the number of feet of each mark so surveyed during the month, and to sign the same, and he is further required to immediately record such bill in the books of his office, and upon being paid his fees for such services, to deliver the original bill to the owner or managing agent of such boom, and all boomage or fees of such boom on any logs or timber are to be collected in accordance with such survey. (Gen. Stat. of Minn., 1894, sec. 2400.)

Such surveyor general is given by law certain fees for surveying or scale-marking, making scale bills and recording the same and posting in the ledger. For the purpose of securing to the officer the payment of such fees, whether the same are for traveling, surveying, making scale bills or recording the same, or for any or all of such services, he is given a lien upon all such logs, timber or lumber surveyed and marked by him for the amount for his services thereon, and may retain such lien by affixing to the scale bill of such logs, timber or lumber before the delivery thereof a true statement of the amount due him thereon, and that he scaled such logs, lumber or timber relying upon such lien, and that he claims a lien thereon for such amount and costs of collection. Thereupon such surveyor general may take actual possession of a sufficient quantity of such logs, timber or lumber, and may retain the same until he is paid the amount due him

thereon, and such logs, timber or lumber shall not be removed or taken from the possession or control of such surveyor general until such payment is made. If the amount is not paid within sixty days after the delivery of such scale bill, the surveyor general may sell at public auction enough of such logs, timber or lumber to pay the amount due him, with the costs of collection, first giving ten days' notice of such scale by posting up five written notices thereof, one in his office and one in each of the four most public places in the town or city where the sale is to be made, and at such sale the surveyor general may become the purchaser. The sale may be made by the sheriff or any constable of the county, and the only costs of collection allowed shall be ten per cent on the amount due for taking care of the property, and to the officer making the sale ten per cent on the amount payable to the surveyor general.

(Gen. Stat. of Minn., 1894, sec. 2402.)

The surveyor general is authorized to appoint any number of deputies necessary to transact the business of his district. (Id., sec. 2396.)

During the month of May, 1893, the defendant in error John H. Mullen, scaled and surveyed in the manner providedd by law a large quantity of logs running out of the boom aforesaid, and in all respects complied with the requirements of law regulating the duties of his said office, for which he claimed the fees for such case made and provided by the statute of the said state and sought to enforce the same by the seizure of a certain quantity of logs claimed by the plaintiff in error. Prior to the date set for the sale of the said logs at public auction, as provided by law, the plaintiff in error brought an action in replevin against the defendant in error, John H. Mullen, to recover the possession of the logs so seized by him, and which were at the time of the bringing of such action in his possession, and thereupon acquired possession thereof under the statutes of said state by executing to the said John H. Mullen a bond conditioned that the property should be delivered to him if delivery thereof should be so adjudged.

In order to carry on the duties of his said office as surveyor general of logs in the said district and to properly survey and scale all of the logs running out of the said boom, it was necessary for the surveyor general to employ, and he did employ, a large number of deputies, clerks and agents, and to construct certain buildings, and at an expense of over sixteen thousand dollars, no part of which has he ever been able to recover from the owner of the logs or the proprietor of the said boom.

Therefore, the legislature of the State of Minnesota by an act approved April 26, 1895, and entitled "An act for the relief of John H. Mullen and to appropriate money therefor," enacted a law providing as follows:

"Sec. 1. That the sum of fifteen thousand eight hundred (15,800) dollars be and the same is hereby appropriated out of any money in the state treasury not otherwise appropriated, for the relief of John H. Mullen for disbursements made and expenses incurred by him while in the performance of his duty as surveyor general of the Fourth district of the State of Minnesota; in accordance with the instruction of the governor; and the state auditor is hereby instructed to draw his warrant upon the state treasurer for said amount and deliver the same to said Mullen, and the state treasurer is hereby directed to pay the same.

Sec. 2. Before said payment is made said Mullen shall assign to the State of Minnesota any and all claims which he may have for labor performed and expenses and disbursements incurred as such surveyor general, and thereupon the State of Minnesota shall proceed to collect the same in the name of said Mullen, or otherwise, as the attorney general may direct, and either by actions now pending or which may hereafter be brought. In case the State of Minnesota shall recover more than the amount hereby appropriated the remainder shall be paid over to said Mullen in the same manner as provided by section one (1) of this act.

Any sums collected by the state up to the amount hereby appropriated shall be paid to the state treasurer and placed to the credit of miscellaneous appropriations.

Sec. 3. This act shall take effect and be in force from and after its passage."

Pursuant to the said last named act the said John H. Mullen made an assignment in due form to the State of Minnesota of any and all claims which he then had already performed and expenses and disbursements incurred as such surveyor general, and thereupon he received out of the moneys of the treasury of said state in consideration for the assignment of said claim, the sum of fifteen thousand, eight hundred dollars ($15,800.)

Thereupon the State of Minnesota, through its attorney general, applied to the court in which the action aforesaid was pending to be allowed to be made a party to the said action, which application was duly granted by the court and without objection on the part of the plaintiff in error, and the State thereupon appeared in the said action, and answered to the complaint of the plaintiff therein, and has ever since continued to be a party thereto.

This motion is based upon—

1. Section 949 of the Revised Statutes of the United States, which provides:

"When a state is a party, or the execution of the revenue laws of a state is enjoined or stayed, in any suit in a court of the United States, such state or the party claiming under the revenue laws of a state, the execution whereof is enjoined or stayed, shall be entitled, on showing sufficient reason, to have the cause heard at any time after it is docketed, in preference to any civil cause pending in such court between private parties."

2. Rule 26 of the Supreme Court, subd. 7, which in part provides:

"No other case will be taken up out of the order on the docket or be set down for any particular day except under special and peculiar circumstances to be shown to the court."

STATE A PARTY.

It is not claimed that the execution of the revenue laws of the State of Minnesota is enjoined or stayed in any suit in a court of the United States. It is, however, claimed that the said state is a party to the action within the meaning of said section 949, and that such fact, in connection with the peculiar circumstances disclosed by the pleadings, entitle the said state to an advancement of the said case upon this motion.

SPECIAL AND PECULIAR CIRCUMSTANCES.

The special and peculiar circumstances relied upon grow out of and are necessarily incident to the business of scaling, surveying, and booming logs in the Mississippi river within the said State of Minnesota.

Vast quantities of logs and lumber belonging to divers owners are annually floated down the Mississippi river to various points situated thereon both within and without the said state. The business of logging and lumbering as now and for many years last past carried on within the limits of the State of Minnesota and other adjacent states, has been and is necessarily and will continue to be of such a nature that the ownership of all logs must be and is necessarily indicated by marks and devices cut upon said logs and such other marks and devices as may from time to time be created and devised. Such marks and devices are now and for many years last past have been and will continue

to be commonly used by all persons, firms and corporations engaged in the business of logging and lumbering for the purpose of indicating the ownership of each, and for the purpose, as far as possible, of separating the property of the one owner from that of another, each owner using in all instances marks and devices other and different from those used by any other owner. Notwithstanding the various contrivances suggested by a long experience and an intimate knowledge of the subject, and owing largely to the fact that the business of logging and lumbering has grown so great and covers so much territory and such quantities of timber and logs, and is engaged in by so many different persons, firms and corporations, it is and for many years last past has been, and for many years yet to come will be, impossible to keep the logs of any particular firm, person or corporation separate and distinct from the logs of any other person, firm or corporation when the same are floated upon the waters of the Mississippi river or of any of the streams tributary thereto. In the practical operation of the business of logging and lumbering it has been found that the logs of different owners become intermingled by reason of accidents, storms, carelessness and particularly the efforts of wrongdoers who, for the purpose of depriving the true owners of their property and their rights in and to the same, take advantage of the unique nature of the property, and seek to and do intermingle the said logs belonging to any one person, firm or corporation whose property they seek to take or control with the logs of others. When logs become so intermingled as aforesaid, whether by chance or otherwise, it becomes, is and will continue to be necessary for the various owners thereof, in order to save their respective logs and properly enjoy the use and benefit thereof, to have the same picked out and separated one from another so far as possible, and for that purpose, among others, there has been and is built, constructed, erected and maintained by said Minnesota Boom Company, within the limits of said state of Minnesota and within the limits of said 4th District and in said West Newton Slough, large booms for the assorting and handling of logs, and inasmuch as the said West Newton Slough is particularly well situated for said purpose, it has been taken possession of by said Minnesota Boom Company, and all of the logs which come down said Mississippi river and its tributaries into said 4th District of the State of Minnesota are floated into and through West Newton Slough and into and through said booms built, erected, constructed, operated and maintained by said Boom Company as aforesaid, for

the purpose of assorting, gathering, collecting, storing, brailing, rafting and handling the same.

After said logs are assorted as aforesaid, and while they are in said boom, they are put up from time to time in brails and rafts in order that they may be conveniently handled and taken from place to place upon said river and for the general convenience of the owners thereof in handling, selling and disposing of the same. It is claimed that during the season of 1893 there passed through said boom in said West Newton Slough five hundred million feet of logs, and that said logs were marked by a large number of different marks, which logs are claimed to have been owned by a large number of different persons, firms and corporations.

Logs floating down the said river are passed through said slough and said boom at a very rapid rate and in very great and large numbers and quantities from time to time while the season lasts, which is a necessarily limited period because of the uncertainty of a sufficiency of water in said Mississippi river to permit said logs to run freely.

The State of Minnesota, for the purpose of protecting the people thereof and their rights in and to their property in logs, and for the purpose of preventing fraud, conversion and wrongdoing in respect to the selling, handling, booming, measuring, brailing, rafting, gathering and storing of said logs and the ownership thereof, has passed the wise and salutary laws for the inspection, scaling and surveying of logs, already adverted to in part.

While said logs are passing through said boom in said slough, they are gathered into brails and rafts and thereafter towed and floated down the Mississippi river to be used for commercial purposes, and are oftentimes sold in bulk in the rafts, and in cases of such sales the purchasers as a general rule are obliged to rely for the quantities in such brails and rafts contained upon the scaling, survey and measurement made at said boom at the time said brails and rafts are made up. When logs passing through said boom are scaled, surveyed and measured by parties interested therein it has been found that many errors and mistakes creep in, and it oftentimes occurs that such mistakes are made purposely so that rafts and brails when made up as aforesaid do not correctly and accurately show the quantities of logs actually therein, although they nominally purport so to do. Hence the necessity for inspection and surveying under public supervision.

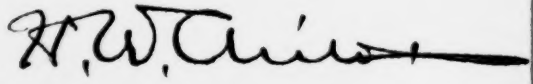
The logs floating down the Mississippi river running through said boom in said West Newton Slough in such large quantities

and with such a diversity of ownership that it has been and is absolutely impossible for the surveyor general of said 4th District to personally perform all the work and duties laid upon him, and it is now necessary, and for many years to come will be necessary, for the surveyor general in the said 4th District to keep a large force of men and deputies in and about his said work in order to carry on the same, and that it is now and will be necessary for him to build a large and expensive camp to care and provide for said men, whereby he will be required to annually expend a very large sum of money.

The proprietors of the said boom and some of the owners of logs and timber boomed and brailed therein deny the right of the state, through its officers and agents, to inspect, survey and measure the said logs and timber, and utterly refuse to pay to such officers and agents any of the fees or compensation provided by law for such inspection, survey and measurement, or for any of the services which they are required to perform in connection with such inspection and survey.

Until the rights and powers of the surveyor general in and for the said district as defined in and prescribed by the statutes of the State of Minnesota involved in the above entitled action, shall have been determined and adjudged therein, the statute, so far as the said district is concerned, will remain a dead letter and wholly inoperative, inasmuch as no citizen of this state will accept the office and undertake to faithfully discharge his duties. Until such judicial determination, no citizen could afford to incur the very large expenses incident to the performance of his duties and await the uncertainties of litigation.

Wherefore, it follows that unless this motion of the said state is now granted, and the date of hearing of this cause is advanced, logs and lumber will be floated down the Mississippi river within the jurisdiction of said state, into and through said boom in defiance of the laws of the said state, although the same may ultimately be sustained by the judgment of your Honorable Court.



Attorney for the Defendants in Error.

Dated: